Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

NO. **75-1101**

HAROLD MELNICK AND DAVID SHRIRO,
Petitioners

vs.

A J. McCLELLAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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vs.

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Respondent

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Harold Melnick and David Shriro, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the Circuit Court of Appeals for the Tenth Circuit, reversing that Court and the Trial Court, and remanding the case.

OPINION BELOW

The Opinion of the Circuit Court of Appeals is not printed pursuant to Rule 17 of the Tenth Circuit.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered November 7, 1975, and a Petition for Rehear-

ing was overruled on December 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1. SHOULD THE CORPORATE FORM BE IGNORED, WHERE EQUAL PARTNERS DEAL WITH THE ENTITY IN A MANNER BENEFITING ALL EQUALLY.

2. ARE THE PARTIES DEEMED TO HAVE CONTEMPLATED FEDERAL STATUTES AND RULES PROMULGATED BY THE SECRETARY OF HOUSING & URBAN DEVELOPMENT WHICH ESTABLISH AN IDENTITY OF INTEREST SO THAT THE CONTRACT CANNOT BE CONSTRUED AS BEING AMONG SEPARATE ENTITIES.

STATUTES AND RULES INVOLVED

12 U.S.C.A. §1715r(c), which in its complete text is attached hereto as Appendix C, provides, in part, as follows:

> "... where the mortgagor is also the builder as defined by the Secretary, there shall be included in the actual cost, in lieu of the allowance for builder's profit under clause (i) or (ii) of the preceding sentence, an allowance for builder and sponsor's profit and risk of 10 percentum ... of all other items entered into the term "actual costs" except land ..."

Pertinent parts of 24 C.F.R. are:

§221.550 *Certificate of actual cost—contents in general.*

(a) Submission of certificate. The mortgagor's certificate of actual cost, in a form prescribed by the Commissioner, shall be submitted prior to final endorsement and upon completion of the improvements to the satisfaction of the Commissioner.

(b) Items to be included. The certificate shall show the actual cost to the mortgagor of:

(1) The cost plus construction contract, including the builder's fee actually paid and approved by the Commissioner; or the lump sum construction contract; or the cost of the construction of the project, where the mortgagor also acts as the general contractor and no construction contract is executed.

(2) The architect's fee

(3) The offsite public utilities and streets not included in subparagraph (1) of this paragraph.

(4) The organizational and legal expenses.

(5) The other items of expense approved by the Commissioner.

§221.550a *Certificate of actual cost—builder's and sponsor's profit and risk allowance.*

(a) In general. The mortgagor's certificate of actual cost shall include (except in a case involving a nonprofit, builder-seller, cooperative, investor-sponsor, or rehabilitation sales mortgagor) an allowance for builder's and sponsor's profit and risk. The amounts of the allowance shall be dependent upon a determination by the Commissioner as to whether or not there exists an identity of interest between the mortgagor or any of its officers, directors, stockholders, or partners and the general contractor.

(b) Identity of interest cases. Where an identity of interest exists, a builder's and sponsor's profit and risk allowance shall be included in lieu of the builder's fee provided for in §221.550 (b) (1). This allowance shall be 10 percent of the actual cost computed in accordance with §221.550 excluding the following items:

(1) Any builder's fee actually paid and approved by the Commissioner. (This fee shall be

paid out of the builder's and sponsor's profit and risk allowance).

(2) The cost of the land or any amount paid for a leasehold.

(3) The value of the land and improvements prior to repair or rehabilitation plus the amount of the mortgage proceeds used to refinance any outstanding indebtedness on the property where the property involves the financing of repair or rehabilitation.

§221.551 *Contractor's certification.*

(a) Certification by general contractor. Where a cost plus form of contract is used by a cooperative mortgagor or where any other type of mortgagor is required by the Commissioner to use such contract, the mortgagor shall submit along with its certificate of actual cost a certification of the general contractor, in a form prescribed by the Commissioner, as to all actual costs paid for labor, materials and subcontract work under the general contract exclusive of the builder's fee and any kickbacks, rebates, trade discounts, or other similar payments to the general contractor, the mortgagor, or any of its officers, directors, stockholders or partners.

STATEMENT OF CASE

A. J. McClellan, Harold Melnick and David Shriro, the parties to the present case, procured land options (Record pp. 84 and 86), and a Commitment for Insurance of Advances issued by the Department of Housing & Urban Development, Federal Housing Administration ("FHA"), under Section 236 of the National Housing Act, 12 U.S.C.A. §1715z-1, (Record p. 184), which is referred to as the "FHA Commitment", to finance the construction of the Lafayette Square Apartments (the "Project").

Subsequently, the parties entered into a written Joint Venture Agreement (Record p. 90) which was

denominated MSM Properties ("MSM"). The parties assigned their land options to MSM.

At or about the same time that MSM was formed, a Limited Partnership was also formed (Record p. 106) and named Lafayette Square Apartments, Ltd. ("Lafayette"). Lafayette became the mortgagor pursuant to the FHA Commitment and MSM became the managing general partner of Lafayette. MSM assigned its land options to Lafayette, the parties assigned their plans and specifications and the FHA Commitment. Michael Coit became a limited partner of Lafayette and contributed $290,000.

The MSM Joint Venture Agreement provides that the parties will share equally in profits and losses.

The Lafayette Agreement of Limited Partnership provides, among other things, as follows: (1) That MSM is entitled to withdraw as a distribution all of the $290,000 Coit contribution (Record p. 111, Paragraph 7.3); and (2) Lafayette may employ The Melnick-Shriro Company, Inc., a Texas corporation (the "Contractor"), to construct the Project (Record p. 123, Paragraph 16.3).

On the approximate same date as the execution of the Partnership and Joint Venture Agreements, a loan closing was held on the Project pursuant to the FHA Commitment, whereby Lafayette became the mortgagor. Various loan documents required by the FHA Commitment and FHA regulations were executed and delivered, and the mortgage note was endorsed by FHA for mortgage insurance. The Contractor at the loan closing for the Project, entered into a Construction Contract (Record p. 144) to build the Project at its actual cost, as defined in the Contract. The construction cost maximum was $2,026,201 although the actual cost of constructing the Project was $2,274,048 (Certificate of Actual Cost, Record p. 159). The Contractor was owned equally by Melnick and Shriro, and McClellan had no interest in the corporation other than acting as its job superin-

tendent for the Project (Agreement and Certification, Record p. 142, Paragraph (5))

MSM withdrew $51,000 of the Coit contribution and distributed the same equally to McClellan, Melnick and Shriro.

The total cost of the Project was $2,817,930, which included The Melnick-Shriro Company, Inc.'s cost overrun of $247,847 as well as the Construction Contract amount, architect's fees, interest, FHA fees, legal expense, financing fees and the like. The total funds available to pay these costs amount to $2,830,171, which includes a final mortgage amount of $2,500,600 and the Coit contribution of $290,000.

Under Federal statutes pertaining to FHA insured mortgages and regulations thereto, the final mortgage allowed by FHA was calculated by multiplying the actual certified costs of the Project plus the market value of the land by 90%. The mortgagor, Lafayette, received a final mortgage loan of 90% of such costs, amounting to $2,500,600 (Maximum Insurable Mortgage, FHA Form 2580, Record p. 193). One item of expense of the Project development that is not an "actual cost", as that term is used in everyday parlance, was a builder's and sponsor's profit and risk allowance ("BSPRA" hereafter) equal to 10% of all costs except land ($243,863 finally allowed by FHA). The BSPRA was not paid to The Melnick-Shriro Company, Inc., but was used to pay Project development costs, and Lafayette and consequently MSM, as a general partner, benefited by allowing additional mortgage proceeds to pay project expenses. The use of the BSPRA of $243,863 as an allowable FHA cost resulted in an increase in mortgage proceeds of $219,477, using the FHA allowable mortgage multiplier of 90% of costs. Under the applicable statute, which provides that where the builder and mortgagor are the same as defined by the Secretary of Housing

& Urban Development, the BSPRA was allowed in lieu of a builder's fee.

The balance of the undistributed Coit contribution, $239,000, was used by Melnick and Shriro to pay the costs of the Project, including the cost overrun of the Contractor.

McClellan filed this suit against Melnick and Shriro claiming that they had no right to use the $239,000 in such a manner and that he was entitled to one-third of such undistributed amount. Melnick and Shriro filed their counterclaim in which they sought a declaratory judgment that they had a right to use the Coit contribution as they did.

As stipulated by the parties in the Pre-trial Order, Paragraph D, (Record p. 62), if Melnick and Shriro are required to distribute one-third of the entire Coit contribution of $290,000 to McClellan, then McClellan will have received a total of $96,666, and by paying their share of the construction costs incurred by or on behalf of their corporation, The Melnick-Shriro Company, Inc., the Contractor, they each will sustain a loss of $16,712.

The Pre-trial Order (Record p. 59) stipulated to all the facts. Melnick and Shriro then moved for Summary Judgment (Record p. 20) and McClellan filed a Motion for Judgment on the merits (Record p. 58). The Trial Court awarded McClellan judgment in the amount of $69,699 against Melnick and Shriro, jointly and severally, which was equal to one-third of the undistributed Coit contribution less certain agreed Joint Venture expenses. The Court of Appeals affirmed such judgment and, hence, this Appeal.

REASONS WHY WRIT SHOULD BE GRANTED

General Considerations

The parties to this suit became personally responsible for the completion of the Project pursuant to the Project loan closing documents, by reason of

their association as MSM, which became the general partner of Lafayette, the mortgagor under the loan closing documents.

The agreements creating MSM and Lafayette must be interpreted in light of the contemplation by the parties that they would embark upon the venture of completing the Project and would hopefully realize a profit to themselves by completing the Project for a cost amounting to less than the available funds. The purpose of the parties' association requires that the various documents executed by them, including the Joint Venture Agreement, the Limited Partnership Agreement and the loan closing documents must all be considered as part of one transaction for the purpose of properly construing them.

The parties are deemed to have contemplated that they could have a mutual advantage by procuring extra mortgage funds to complete the Project by causing Melnick and Shriro's corporation to become the Contractor on the Project. This was true because a builder's and sponsor's profit and risk allowance was granted under the mortgage rather than a builder's fee because the builder and mortgagor were the same as defined by statute and the regulations of the Secretary of Housing & Urban Development.

Likewise, because of such statutes and regulations, the parties are deemed to have contemplated, when they executed the various agreements, that the Construction Contract was executed to secure their mutual benefit. It is, therefore, unconscionable that McClellan could secure the benefit of the BSPRA without exposing himself to the risk of construction. It is unreasonable to assume that Melnick and Shriro, through the Contractor, had agreed to assume all the risk of construction, thus gratituously guaranteeing McClellan a profit when they had agreed that all profits and losses from the venture would be shared equally.

It has long been the rule of law that the corporate veil would be pierced to prevent the unjust enrichment of a corporation's shareholders who have simply used a corporation as a device for over-reaching. It should be just as much the rule of law that the corporate veil would be pierced so it can not be used as a device to unjustly enrich one who dealt with a corporation and its shareholders in disregard of the corporate form. This is especially true since the recognition by FHA of the identity of interest between the Contractor and the parties required that the corporate form be ignored.

SPECIFICS

POINT ONE

SHOULD THE CORPORATE FORM BE IGNORED, WHERE EQUAL PARTNERS DEAL WITH THE ENTITY IN A MANNER BENEFITING ALL EQUALLY.

The construction contract to build the Project entered into by the Contractor is unilateral unless the corporate form of the Contractor is disregarded. The construction contract (Record pp. 144 and 145) provided that the Contractor would perform the construction of the Project without fee and for a maximum upset price guarantee. This maximum upset price, when calculated according to the contract, resulted in a total price of $2,026,201 although the actual cost of constructing the Project was $2,274,048 (Certificate of Actual Cost, Record p. 159).

The ultimate question to be decided by the Court is whether the cost overrun of the Contractor is to be included in the total Project development cost to MSM, which would be used in determining the net profit to MSM to be distributed to the parties to this lawsuit.

The Court below in affirming the Trial Court stated, "And, like the Trial Court, we think the key to this entire matter is the fact that the Joint Ven-

ture (MSM) is a business entity which is not the same as and on the contrary is different and distinct from, the Melnick-Shriro Company".

It is contended, that in light of the contract, the key to this case is that MSM, Lafayette and the Contractor were the same, were treated the same by the parties and FHA, and that all entities were used as devices for the parties to obtain a profit from the development of the Project. McClellan, Shriro and Melnick, individually, then as MSM, and then as Lafayette, entered into a series of contracts and actions that were part and parcel of the entire scheme leading up to the completion of the Project.

Beginning in January, 1971, the parties acquired land options for the Project (Record pp. 84 and 86). The parties made application for and obtained the Commitment from FHA in November, 1971 (Record p. 184). They then entered into the MSM Joint Venture Agreement (Record p. 90) and approximately at the same time entered into the Lafayette Agreement of Limited Partnership (Record p. 106) and closed the Project mortgage loan.

Although the Joint Venture Agreement (Record p. 104, Article XVIII) and the Lafayette Limited Partnership Agreement (Record p. 124, Paragraph 17.4) provide that the documents will be construed in accordance with the laws of the State of Texas and although certain documents were executed in the State of New Mexico, it is not perceived that the laws of the two states are significantly different nor is it perceived that general contract law varies between the states significantly as applied to this case.

Since the various documents including the Joint Venture Agreement and the Limited Partnership Agreement as well as the loan closing documents were part of a single transaction, they should all be construed together. 13 *Tex. Jur.* 2d 274, *Veal vs. Thomason* 138 Tex. 341 159 SW2d 472, (Tex. Sup. Ct. 1942). The rule is often stated that "if instruments are executed at the same time" they will be construed together (see, for example, *Braniff Invest. Co. vs. Robertson* 12 Tex. 524, 81 SW2d 45 (Tex. Sup. Ct. 1935)), but the rule is, likewise, applicable whether documents are executed contemporaneously or at different times if they pertain to the same transaction. *Board of Insurance Commissioners vs. Great Southern Life Insurance Co.* 150 Tex. 258, 239 SW2d 803 (Tex. Sup. Ct. 1951).

The execution of the Building and Loan Agreement (Record p. 128) between Lafayette as mortgagor and the Project mortgagee, made the parties, through MSM as general partner of Lafayette, personally responsible for completing the Project in accordance with the plans and specifications. In view of MSM's right to withdraw the Coit contribution of $290,000 (Agreement of Limited Partnership, Record p. 108, Paragraph 6.2) a withdrawal could result in a profit only if the Project development costs did not exceed the mortgage, contribution of Coit, and any other sources of revenue. That is to say that the right to withdraw the Coit contribution of $290,000 was meaningless and was of no benefit except to the extent that it represented money that was un-needed to defray Project development costs.

According to the Pre-trial Order (Record p. 62) the Project total cost was $2,817,930, which included the Contractor's cost overrun, and the total money received from all sources was $2,830,171, which included the mortgage and the $290,000 Coit contribution. Of the latter money, $51,000 had been distributed equally among McClellan, Melnick and Shriro.

Included in the mortgage amount, was a builder's and sponsor's profit and risk allowance of $219,477 which was used by the parties, along with the balance of the mortgage proceeds, to pay Project development costs, not including any fee to the Contractor.

The mortgage amount is limited by law and may not exceed 90% of the estimated value of the property or project. 12 U.S.C.A. §1713. The BSPRA is equal to 10% of all items of cost exclusive of land (12 U.S.C.A. §1715r(c)) and was $243,863 (Mortgagor's Certificate of Actual Cost, Record 172), which, when multiplied by the statutory limit amount of 90% of cost, equals the $219,477 finally included in the mortgage.

The Uniform Partnership Act, (The Texas Act, Article 6132b, §18(b) V.A.T.S. and the New Mexico Act, 1953 Comp. §66-1-18(b) provides as follows:

> "(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business . . ."

Article IV of the Joint Venture Agreement provides as follows:

> ". . . each Joint Venturer shall advance to the Joint Venture the Joint Venturer's pro rata share . . . of all costs, expenses or charges with respect to the ownership, operation, development, maintenance and up-keep of the Venture property to the extent such costs, expenses and charges exceed the income, if any, derived from the Venture property and the proceeds of any loans made to the Joint Venture."

To hold that Melnick and Shriro intended to insulate McClellan from the risk of construction and take that risk on themselves by causing their corporation to become the Contractor flies in the face of reasonableness, sound business judgment and the expressed intention of the parties to share equally in profits and losses.

In *Rusk vs. First National Bank* 210 SW 521, (Tex. Com. App. 1919), the Court held that though a contract is not ambiguous, it should be considered in

view of circumstances and subsequent acts of the parties to discover their intentions. In holding that the Court would look to the circumstances of the case to see if an executed agreement was binding or merely executory, it stated that the rule that if language of a contract is unambiguous the Court will apply its plain meaning, is not an absolute rule. If the language, when applied to the situation, leads to "such unreasonableness as to suggest that parties probably did not so intend", then the Court will look elsewhere to discover the intentions of the parties. Similarly, in *Munger vs. Waggoner* 260 SW 696 (Tex. Com. App. 1924) the Court said that contracts must receive reasonable interpretation according to the intentions of the parties, and that where meaning is plain the agreement must be enforced is the general rule, "but such required literalism is not pushed to preposterous lengths of requiring that by its operation the general intention of the parties as evidenced by their contract should be frustrated or perverted, either in whole or in part".

There are two possible constructions of the construction contract in light of the Joint Venture Agreement to share profits and losses equally: (1) Melnick and Shriro caused their corporation, the Contractor, to give the cost upset guarantee with no fee for the purpose of assuring MSM that it would have a substantial profit to divide among the parties; or (2) that in causing the Contractor to execute the construction contract, the parties intended to benefit themselves by procuring the BSPRA while allowing each to be reimbursed his reasonable expenses incurred in the prosecution of the business of MSM and then dividing the net profits.

> "Furthermore, if the language used in the agreement is susceptible to two constructions, that interpretation will be adopted which renders the contract fair and reasonable, rather than a construction that will lead to unreasonable, oppressive, or ridiculous results." 13 *Tex.Jur.* 2d 268.

The same rule is recited in *American Jurisprudence* 2d, Contracts, §252. In *Hoffer Oil Corporation vs. Hughes* 16 SW2d 903, the Court held that a contract, even though plain in meaning, will be interpreted in the light of the circumstances, and, if the circumstances so dictate, where the contract is then subject to two interpretations, "the Court will not adopt an oppressive one".

The Trial Court relied heavily on the case of *Palmer vs. Howard* 493 F. 2d 830 (10th Cir. 1973) in holding that the execution of the Construction Contract constituted a "specific amendment to the rule of equal division of profits and losses . . ." since the Contractor still had a major incentive to complete the Project at a cost under the funds available to MSM (Memorandum of Opinion, Appendix B-5.) This reasoning is patently faulty since it: (1) Ignores the near simultaneous execution of all documents; and (2) Treats the Contractor as an entity separate from MSM while attributing the profit motives of its shareholders as the consideration for guaranteeing McClellan a profit. The *Palmer vs. Howard* case is distinguishable on its facts in one extremely important facet—the contractor there was to receive a fee for the performance of the contract.

It is unconscionable for McClellan to claim the separateness of the Contractor entity to prevent a loss, and at the same time cling to the identity of interest to obtain an advantage.

POINT TWO

THE FEDERAL STATUTES AND RULES PROMULGATED BY THE SECRETARY OF HOUSING & URBAN DEVELOPMENT THEREUNDER WHICH ESTABLISH AN IDENTITY OF INTEREST BETWEEN THE PARTIES AND THE CONTRACTOR IS DEEMED TO HAVE BEEN CONTEMPLATED BY THE PARTIES IN THE EXECUTION OF THE CONTRACT DOCUMENTS, WHICH CANNOT THEN BE CONSTRUED AS BEING AMONG SEPARATE ENTITIES.

Although literally hundreds of thousands of FHA insured rental units have been built and financed under the statutory test of ". . . when the mortgagor is also the builder . . ." (12 U.S.C.A. Section 1715r(c)), no cases have been found interpreting the statute nor the rules of the Secretary of Housing & Urban Development promulgated thereunder. It would, therefore, seem to be a crucial question for the Department as well as for the building industry as a whole as to whether or not the statute and rules which disregard the form of a transaction and look only to the substance are to be guiding principles in establishing financing criteria for an industry already plagued by more than its share of economic woes.

The opinion of the Court of Appeals ignores the statute and can be read as merely holding, in conformity with the creation of the ancient fiction, that a corporation is an entity separate from its shareholders. Even though the opinion does not mention the statute, the recitation of the facts of the case clearly hold that the builder and the mortgagor in this case are not the same. This holding would emasculate the intent of Congress and prevent the Secretary of Housing & Urban Development from enforcing its identity of interest rules. The importance of the rules, which go to the substance of a transaction rather than its form, is that they form a sound basis for determining insurable mortgage amounts where the various entities are so related that there must be safeguards against financial abuse. If the form only is the key to interpretation of the statute, a corporation or other business entities could be used to make contracts and payments that would result in unjust enrichment to those dealing with themselves to inflate FHA insured mortgage funds.

The evident scheme of the statute and rules on the one hand is to prevent payments to or benefiting the mortgagor or those directly connected with the mortgagor, and on the other to provide a device (the

BSPRA) that will allow additional mortgage funds under certain conditions that are monitored by FHA.

The rules, promulgated by the Secretary of Housing & Urban Development pursuant to the statutory directive to define when the builder and mortgagor are the same, describe the conditions and precedents under which an identity of interest exists and the results of such existence.

These regulations provide that the mortgagor will submit a certificate of actual cost which shall include, among other things, the cost of construction, including a builder's fee. 24 C.F.R. Section 221.550. They also provide that where an identity of interest exists, a builder's and sponsor's profit and risk allowance shall be included in lieu of the builder's fee. 24 C.F.R. Section 221.550a. A contractor is, likewise, required to present a certificate of actual cost. 24 C.F.R. Section 221.551.

An Agreement and Certification (Record p. 142) was executed between Lafayette, by MSM as general partner, the mortgagee and FHA, and paragraph (11) provides in part as follows:

> "Mortgagor agrees that, if there is an identity of interest between the mortgagor and the general contractor, the construction will be on a cost plus fee basis with a maximum upset price, provided, however, that in lieu of the contractor's fee, the mortgagor shall be entitled to include in its certificate of actual cost an allowance for builder's and sponsor's profit and risk."

Paragraph (5) of the Agreement and Certification sets forth the financial relationships between the mortgagor and other persons. It is based upon this document that a BSPRA was ultimately allowed by FHA in lieu of a builder's fee. The Certificate of Actual Cost of the mortgagor (Record p. 172) was ultimately accepted by FHA (FHA Form 2580, Record p. 193). This finding was evidenced by the endorsement by FHA for mortgage insurance of the Project

mortgage note (Record pp. 134 and 135) initially at the time of execution and acceptance of the loan documents and finally upon completion of the Project and approval of the required cost certification (Mortgagor's Certificate of Actual Cost, Record p. 172, and FHA Form 2580, Record p. 193).

There is, therefore, a statute, administrative rule and administrative recognition of the identity of interest which conclusively shows that the Contractor and the parties to this suit were, contrary to the holding of the lower Court, the same.

The BSPRA is given pursuant to 12 U.S.C.A. 1715r(c) and 24 CFR Section 221.550a, which provides that "where an identity of interest exists, a builder's and sponsor's profit and risk allowance shall be included in lieu of the builder's fee provided for in Section 221.550(b) (1)." According to the latter cited regulation, the certified costs of the mortgagor may include a builder's fee instead of the BSPRA where there is no identity of interest.

The parties were, therefore, entitled to employ a builder that would have no identity of interest, have a builder's fee allowed to pay such builder and thus could have insulated themselves from the risk of construction. There was a choice available to the parties, and the choice that they took resulted in a 10% BSPRA available to them to pay project development costs instead of merely having a builder's fee allowed to pay the Contractor as ". . . approved by the Commissioner . . ." 24 C.F.R. Section 221.550.

The Court of Appeals, in citing the similarity of the facts of *Palmer vs. Howard* 493 F.2d 830 (10th Cir. 1973), while ignoring the fact that the Contractor in that case was to receive consideration, a builder's fee, for promising to hold construction costs to a specific figure, held that the Contractor was a separate entity from MSM.

The clear and novel question presented is whether or not the statute and regulations and the choice

thereunder is a choice that the parties will have been deemed to have contemplated when they entered into a Joint Venture Agreement agreeing to share profits and losses equally.

It has long been settled, both in Texas and in this Court, that:

> "As a general rule, it may properly be said that laws in existence at the time and place of making a contract, as well as laws then existing at the place where the agreement is to be performed, constitute an integral part of the contract, just as if they had been expressly incorporated therein. Indeed, it is conclusively presumed that the parties to the contract knew the law and contracted with reference to it, and the agreement will therefore be construed with regard to such laws as were then in existence" 13 *Tex.Jur.* 2d 352-354.

See also authorities in support of the rule: *Anderson-Berney Realty Co. vs. Soria* 41 SW2d 279 (Tex. Civ. App. 1931), affirmed 123 Tex. 100, 67 SW2d 222; *Trinity Portland Cement Co. vs. Lion Bonding and Surety Co.* 229 SW 483 (Tex. Com. App. 1921); *Great Northern Railway Co. vs. Sunburst Oil and Refining Co.* 287 US 358, 53 Sup. Ct. 145; 17 *Am. Jur.* 2d 654.

As parties are presumed to have in mind all existing laws relating to the contract or the subject matter thereof, the same is true for an administrative rule promulgated pursuant to a legislative directive, which is held to have the same force and effect as law. *Foley vs. Benedict* 122 Tex. 193, 55 SW2d 805 (Tex. Sup. Ct. 1932). *Illinois Steel Co. vs. Baltimore & Ohio Railroad Company* 320 US 508, 88 L.Ed. 259 64 Sup. Ct. 322 (1944).

Since all the statute and rules thereunder were in force at the time of the transaction in question in this lawsuit, which comprise the four corners of the contractual arrangements, the parties should be deemed to have contemplated the legislative and

regulatory choice when they execute a joint venture agreement agreeing to divide the profits and losses equally.

CONCLUSION

The Joint Venture Agreement, Agreement of Limited Partnership and loan closing documents, are all part of a single transaction and must all be viewed together to ascertain the intent of the parties. The parties are presumed to have been aware of the statutes and regulations applicable to the matters and objects with which they are contracting, and a party cannot now deny his liability for costs on a theory relating to matters of form when he was pleased to receive the benefit of denying the form. The entire cost of construction, including the Contractor's cost overrun, were costs to the Joint Venture to be shared equally by the parties. The judgment should be reversed and remanded with directions to set it aside and to enter judgment dismissing the complaint and rendering declaratory judgment that the Coit contribution was properly used by Melnick and Shriro to pay construction costs incurred by their corporation in excess of the maximum costs provided for in the Construction Contract.

Respectfully submitted,

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APPENDIX A

NOT FOR ROUTINE PUBLICATION
(See Rule 17, 10th Cir.)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 74-1758

A. J. McCLELLAN,
Plaintiff-Appellee,

v.

HAROLD MELNICK and DAVID SHRIRO,
Defendants-Appellants.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 10050)

Russell Moore (Keleher & McLeod, on the brief), for Plaintiff-Appellee.

Owen B. Marron and Jay M. Goltz (Marron & McKinnon, on the brief), for Defendants-Appellants.

Before Mr. Justice CLARK,* LEWIS, Chief Judge, and McWILLIAMS, Circuit Judge.

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

McWILLIAMS, Circuit Judge.

This is a contract dispute with jurisdiction being based on diversity. 28 U.S.C. §1332. McClellan, Melnick & Shriro, the parties to the present proceeding, by written agreement formed a joint venture, the object of which was to buy and develop properties, and more particularly to build an apartment complex in Albuquerque, New Mexico. The joint venture was denominated MSM, and by way of contribution the parties thereto assigned to MSM two options to purchase Albuquerque real estate, plans and specifications for an apartment building to be erected thereon, and a commitment from F.H.A. to insure a mortgage loan for financing the project. The joint venture agreement provided that the parties would share equally in profits and losses of the venture.

Contemporaneous with the forming of MSM, a partnership was also formed and it was the partnership, rather than MSM, which thereafter carried forward the building of the apartment. This partnership was denominated as Lafayette Square Apartments, Ltd. MSM assigned to Lafayette Square its options, plans and specifications, and loan commitment and in return therefor received a 10% interest in Lafayette Square. MSM was designated as a general partner. American 236 Housing Corporation contributed $100 to Lafayette Square, and received a 1% interest in the partnership. American 236 was designated as a corporate general partner. Michael Coit contributed $290,000 to Lafayette Square and received an 89% interest in the partnership. Coit was a limited partner. The partnership agreement which brought into being Lafayette Square expressly provided that MSM had the right to withdraw for its own purposes all of the money contributed by Coit.

A few days after the formation of MSM (the joint venture) and Lafayette Square (the partnership), the latter, i.e., Lafayette Square, entered into a construction contract for the erection of the apartment with Melnick-Shriro Company, Inc., a Texas corporation, whose issued stock was all owned by Melnick and Shriro. McClellan had no stock interest in the Melnick-Shriro Company. The corporation, i.e., Melnick-Shriro Company, agreed to build the apartment at cost, without fee, and further agreed that in no event would the cost exceed $2,026,201. However, the actual cost of constructing the apartment was $2,274,048.

In accord with the provision in the partnership agreement that MSM had the right to withdraw the cash contribution made by Coit, Melnick and Shriro then caused the $290,000 to be delivered over to MSM. Melnick and Shriro thereafter used $239,000 of this money to offset the additional cost incurred by Melnick-Shriro Company in its construction of the apartment building. The balance of the $290,000, namely $51,000, was distributed equally to McClellan, Melnick & Shriro.

It was in this general setting that McClellan brought the present action against Melnick and Shriro for breach of contract. The gist of the complaint was that the $290,000 received by MSM under the partnership agreement was an asset of the joint venture and that no part of such monies should have been diverted to pay off the cost overrun incurred by the Melnick-Shriro Company in building the apartment. In other words, it was McClellan's position that the entire $290,000 should have been distributed equally to the three joint venturers. Melnick and Shriro filed a counterclaim in which they sought a declaratory judgment that they had a right to use the $290,000 as they did.

By pre-trial order the parties stipulated to all the facts. Melnick and Shriro then moved for summary judgment, and McClellan moved for judgment on the merits. The case was then submitted to the trial court for final disposition on this basis. The trial court ruled in favor of McClellan and awarded him judgment in the amount of $69,699 against Melnick and Shriro, jointly and severally. The latter now appeals the judgment entered against them.

A joint venture, perhaps more accurately described as a joint adventure, is defined in general terms as a special combination of two or more persons devoted to a specific enterprise in which profit is sought without actual partnership or corporate designation, and is based upon some form of an agreement, either express or implied. Opco, Inc. v. Scott, 321 F.2d 471 (10th Cir. 1963).

Although this is a diversity case, there is no suggestion that any unusual or peculiar local contract law has bearing on the particular factual situation here at hand. Hence, only general principles of contract law apply. In this connection the parties agree, for example, that the ultimate question to be determined is what was the intent of the parties. The parties further agree that in the instant case intent is to be determined from the matters stipulated to in the pretrial order and from the documentary evidence before the court, including the joint venture agreement, the partnership agreement and the construction contract between the partnership, i.e., Lafayette Square and Melnick-Shriro Company, the Texas corporation that contracted to build the apartment. Another general principle of contract law that comes into play is that a contract which is unambiguous in its terms should be enforced as written. McKinney v. Davis, 503 P.2d 332 (N.M. 1972). Also, when, as here, several instruments have been executed more or less contemporaneously and relate to the same subject matter, they should be read together. Board of Ins. Com'rs v. Great Southern Life Ins. Co., 239 S.W.2d 803 (Tex. 1951), and Veal v. Thompson, 159 S.W.2d 472 (Tex. 1942). Let us analyze the facts as stipulated to by the parties in the light of those well established principles of contract law.

When MSM, the joint venture, assigned its options, plans and specifications, and F.H.A. commitment to Lafayette Square, the partnership, the latter then became the business entity which owned the options, plans and specifications, and F.H.A. commitment, and

which was charged with carrying forward the acquisition of the land and the construction of the apartment complex. At that point in time, then, the joint venture, as such, owned no interest in the land where the apartment house was to be built. However, in place of the options, plans and specifications, and F.H.A. commitment which had been assigned to the partnership, the joint venture did own a 10% interest in Lafayette Square and also had the right to the $290,000 which Coit had contributed to Lafayette Square in exchange for an 89% interest in the partnership. So, this $290,000 was an asset of the joint venture.

As indicated, Lafayette Square entered into a construction agreement with a third business entity, namely, Melnick-Shriro Company, a Texas corporation whose stock was all owned by Melnick and Shriro. McClellan had no stock interest in this company. And, like the trial court, we think the key to this entire matter is the fact that the joint venture (MSM) is a business entity which is not the same as, and on the contrary is different and distinct from, the Melnick-Shriro Company. Furthermore, Melnick-Shriro Company, the corporation, is a separate entity from its stockholders, and this is true even though Melnick and Shriro, as individuals, own all the stock of the corporation. Bank of New Mexico v. Rice, 429 P.2d 368 (N.M. 1967), and Shillinglaw v. Owen Shillinglaw Fuel Co., 370 P.2d 502 (N.M. 1962). Such being the case, the assets of MSM could not be lawfully used to offset the losses of Melnick-Shriro Company, nor could the loss incurred by Melnick-Shriro Company be viewed as a contribution by Melnick and Shriro, as individuals, to the joint venture. Hence, Melnick and Shriro, as members of the joint venture, had no right to take $239,000 from MSM to offset the loss incurred by Melnick-Shriro Company in the construction of the apartment. The entire $290,000, being an asset of MSM, should have been distributed equally to the three venturers. Such was the effect of the judgment entered by the trial court.

A case which bears at least a degree of similarity to the instant case is Palmer v. Howard, 493 F.2d 830 (10th Cir. 1973). There, a joint venture was formed to build a shopping center. One party to the venture contributed the land on which the center was to be built. Another party to the joint venture was to actually construct the center, and the latter agreed that the total development expenses would not exceed the total amount of the long term financing proceeds. There was a cost overrun, and a dispute arose as to whether the party to the venture who made the land contribution should pay a share of the cost overrun. The trial court held that the cost overrun should be borne entirely by the joint venturer who was charged with the construction of the center and who had promised to hold construction costs to a particular figure. In affirming, we noted that ordinarily true joint venturers share equally in losses as well as profits, but that such is not an "invariable," and that venturers may "vary" this general principle in their own specific agreement. In the instant case there is no "variance," as such, of the provision in the joint venture agreement that profits and losses be shared equally. Rather, this is but an instance where Melnick-Shriro Company, the corporation, simply seeks to recoup its loss as though it were a joint venturer, which it is not.

Judgment affirmed.

NOVEMBER TERM — DECEMBER 3, 1975

Before The Honorable Tom C. Clark*, Associate Justice Supreme Court, Retired, The Honorable David T. Lewis, Chief Judge and The Honorable Robert H. McWilliams, Circuit Judge

*Sitting by designation

A. J. McCLELLAN,
Plaintiff-Appellee,

v.

HAROLD MELNICK and DAVID SHRIRO,
Defendants-Appellants.

This matter comes on for consideration of the appellants' petition for rehearing which was filed in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied.

HOWARD K. PHILLIPS,
Clerk

By ______________________
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

A. J. McCLELLAN,

Plaintiff,

v.

HAROLD MELNICK and DAVID SHRIRO,

Defendants.

NO. 10050 CIVIL

MEMORANDUM OPINION

This contractual dispute between the members of a joint venture agreement concerns the proper distribution of certain cash assets among the venturers. Since the plaintiff is a New Mexico citizen and both defendants are citizens of Texas and since the jurisdictional amount is not controverted, the Court has jurisdiction of the cause under 28 U.S.C.A. §1332, the diversity statute. The matter comes before the Court upon cross-motions for summary judgment, the parties having agreed that questions of law alone remain to be answered and that no witnesses would be offered at trial.

The parties formed a number of agreements for the purpose of developing and operating an apartment complex in Albuquerque, New Mexico. On December 3, 1971, A. J. McClellan, the plaintiff, and Harold Melnick and David Shriro, the defendants, entered a joint venture agreement in which they christened their enterprise MSM Properties, and agreed to divide equally all profits and losses of the operation. On the same day, the joint venture as general partner, American 236 Housing Corporation as corporate general partner, and one Michael Coit as limited partner, formed a limited partnership denominated Lafayette Square Apartments, Ltd. (LSA).

In actuality, this entity became the instrumantality through which all subsequent business dealings concerning the original venture scheme

were effectuated, i.e., LSA was a contracting party to all subsequent agreements, including the FHA loan contract and the construction contract itself. MSM, as the managing general partner, managed the business affairs of the partnership. The initial assets of the partnership consisted of certain real estate conveyed to it by MSM (which served as the situs of the development) and a $290,000 cash contribution by Coit, the limited partner. The proper disposition of this fund is the source of the present controversy.

On December 7, 1971, LSA and the Melnick-Shriro Company, Inc., a construction company owned exclusively by these two members of the joint venture, entered a contract in which it was agreed that the construction company would build the apartment structure at cost and that in no event would it receive more than $2,006,840, plus certain incidental expenses, as total payment under the contract.[1]

Unfortunately however, the Melnick-Shriro Company was unable to contain construction costs within the stated maximum, and the final cost of the project exceeded by $259,864.26 the amount payable under its contract. To avoid a sizeable loss to their company, Melnick and Shriro withdrew the Coit contribution from the limited partnership and applied it to the cost overruns, believing they were entitled to do so under the various agreements. Quite expectedly, McClellan strenuously objected to this conduct, arguing that the defendants were bound by the amount specified in their construction contract qnd that the Coit contribution should be distributed in equal shares among the co-venturers upon withdrawal. This recitation relates the factual background of the

[1]Article 3 of the construction contract provides in pertinent part:

"A. (1) Subject to the provisions hereinafter set out, the Owner shall pay to the Contractor for the performance of this Contract the following items in cash:

(a) The actual cost of construction as defined in Article 10 below; plus

(b) A fee of $ None

dispute and the Court must now decide whether the Coit contribution could properly be applied to the contractor's cost overruns.

The defendants cite several contractual provisions in support of their interpretation of the agreements. Paragraph 7.3 of Article VII of the limited partnership agreement reads:

> "7.3. *Distribution to the General Partner.* Notwithstanding anything contained in paragraph 7.2. to the contrary, the General Partner, MSM Properties, shall be entitled to withdraw as a distribution all of the $290,000 of capital contribution to the Partnership by the Limited Partner which is referred to in paragraph 6.2.
> hereof at the times and in the amounts such contributions are made, and neither of the other Partners shall be entitled to participate in any respect in such distribution. Likewise, all net proceeds from the initial closing shall belong to such General Partner who may also withdraw such funds at any time thereafter.

Article IV (2) of the joint venture agreement provides:

> "(2) *Future Contributions.* By the affirmative vote of sixty-six and two thirds (66²/₃%) percent in interest, of the Joint Venturers, each Joint Venturer shall be obligated to make such additional cash advances as may be required. The Manager of the Joint Venture may determine that each Joint Venturer shall advance to the Joint Venture the Joint Venturer's prorata share (the ownership percentage set opposite the name

In no event, however, shall the total cash payable pursuant to this paragraph (1) exceed $2,006,840.00 plus the amount by which the sum of mortgage interest (including financing fees), taxes, property and mortgage insurance premiums itemized in Para. (5) of the mortgagor's Building Loan Agreement for this project exceeds the mortgagor's actual cost of these items."

These expenses totalled $7,844.00 and the final amount due under the contract was $2,014,684.00.

of each Joint Venturer in Exhibit A) of all costs, expenses or charges with respect to the ownership, operation, development, maintenance and upkeep of the Venture Property to the extent such costs, expenses or charges exceed the income, if any, derived from the venture Property and the proceeds of any loans made to the Joint Venture."

Finally, after a declaration in Article V (1) of the venture agreement that the venturers shall divide all profits and losses equally in accordance with their respective one-third interests, Article V (2) provides:

"(2) *Distributions.* Distributions from the Joint Venture to the respective Joint Venturers shall be made to the Venturers in proportion to their ownership interest at such times and in such amounts as may be determined by an affirmative vote of sixty-six and two-thirds (66⅔%) per cent in interest of the Joint Venturers. The Managing Venturer shall not accumulate funds beyond that which is necessary to meet anticipated expenditures and shall submit such additional funds for distribution on a quarterly basis."

Defendants assert that these provisions establish their entitlement to relief contending that the sums advanced by Coit belonged to the venture and that they had a right to order additional contributions from each venturer of his share in the venture asset by a two-thirds vote of the members.

However, the Melnick-Shriro Company bound itself unequivocally to the receipt of a designated maximum amount for the performance of its services as contractor for the partnership project. MSM, the managing general partner of LSA and McClellan, one of the venturer's members, *were direct beneficiaries of the promissory limitation and were not bound to pay any additional sums should the contract price be exceeded.* Defendants have attempted to circumvent the express limitation to which they agreed

by contending that the cost overruns constituted an advancement of capital by them to the venture and that, in effect, the overruns were a venture obligation which MSM was bound to pay. In the absence of an express limitation, this argument might be more persuasive. However, the overrun was simply a construction debt of the general contractor and not an obligation of the joint venture. The partnership agreement was the specific device through which the venture sought to effectuate the development and completion of the project. The contractual limitation therein constituted a specific amendment of the general rule of equal division of profits and losses in a joint venture and bound the contractor to the amount specified. See Palmer v. Howard, 493 F.2d 830, 834-835 (10th Cir. 1974). To interpret this provision otherwise would completely nullify and render meaningless the contractual protection which MSM and McClellan received from the contractor's promise to absolutely limit its costs. In thus confining its costs, *the contractor still had a* major incentive to perform the work since completion of the project at a cost under the combined total of the mortgage proceeds and the Coit contribution would result in a substantial venture profit for distribution among the venturers. For these reasons, therefore, the Court must conclude that the Coit contribution, although a venture asset, could not be applied against a non-venture liability.

The conclusion reached herein is further supported by reference to paragraphs 7.3 and 7.4 of Article VII of the partnership agreement. Paragraph 7.3 has been set forth previously. Paragraph 7.4 declares:

"7.4. *Distribution for Payment to General Contractor.* It is acknowledged that the General Partner may withdraw from the partnership such sum of money which they contribute for the purpose of paying the general contractor for its services."

When read in conjunction, it seems apparent that the parties specifically agreed that only such sums contributed by the individual venturers to the partnership could be withdrawn from LSA's coffers for payment to the general contractor and not those amounts contributed by the limited partner.

Therefore, the Court has determined that the Coit contributions were improperly applied by the defendants to the cost overruns of their company and that they must restore the sums diverted to the joint venture for eventual distribution as profits to the co-venturers. Plaintiff's Motion for Summary Judgment will be granted and defendants' similar Motion will be denied and an Order will be entered in accordance herewith.

UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

A. J. McCLELLAN,
Plaintiff,

v.

HAROLD MELNICK and DAVID SHRIRO,
Defendants.

No. 10050 CIVIL

JUDGMENT

This matter having come before the Court upon the cross-motions for Summary Judgment filed by the parties and the Court having considered the pre-trial order and the uncontroverted facts recited therein, and exhibits, pleadings and briefs of counsel, and the Court having entered its Memorandum Opinion, and being fully advised in the premises, FINDS the issues in favor of the Plaintiff and against the Defendants.

IT IS THEREFORE ORDERED that judgment be and is hereby entered in favor of the Plaintiff and against the Defendants and each of them in the sum of $69,699.00 and that costs of this action be taxed against Defendants.

CERTIFIED a True Copy of the original filed in my office.

L. G. Kanaly, Clerk

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Deputy	United States District Court Judge

Approved:

KELEHER & MCLEOD P.O. Drawer AA Albuquerque, New Mexico 87103	MARRON & MCKINNON 426 Sandia Savings Building Albuquerque, New Mexico 87102
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Russell Moore *Attorneys For Plaintiff*	Owen B. Marron *Attorneys for Defendants*

A True Copy. Certified this..........day of..............................

(Signed) L. G. Kanaly, *Clerk*

Clerk.

*(by)*______________________________

Deputy Clerk.

§ 1715r. Requirement of builder's cost certification; definitions

Notwithstanding any other provision of this chapter, no mortgage covering new or rehabilitated multifamily housing or a property or project described in subchapter IX—B of this chapter shall be insured under this chapter unless the mortgagor has agreed (a) to certify, upon completion of the physical improvements on the mortgaged property or project and prior to final endorsement of the mortgage, either (i) that the approved percentage of actual cost (as those terms are herein defined) equaled or exceeded the proceeds of the mortgage loan or (ii) the amount by which the proceeds of the mortgage loan exceeded such approved percentage of actual cost, as the case may be, and (b) to pay forthwith to the mortgagee, for application to the reduction of the principal obligation of such mortgage, the amount, if any, certified to be in excess of such approved percentage of actual cost. Upon the Secretary's approval of the mortgagor's certification as required hereunder, such certification shall be final and incontestable, except for fraud or material misrepresentation on the part of the mortgagor. As used in this section—

(c) The term "actual cost" has the following meaning: (i) in case the mortgage is to assist the financing of new construction, the term means the actual cost to the mortgagor of such construction, including amounts paid for labor, materials, construction contracts, off-site public utilities, streets, organizational and legal expenses, such allocations of general overhead items as are acceptable to the Secretary, and other items of expense approved by the Secretary, plus (1) a reasonable allowance for builder's profit if the mortgagor is also the builder as defined by the Secretary, and (2) an amount equal to the Secretary's estimate of the fair market value of any land (prior to the construction of the improvements built as a part of the project) in the property or project owned by the mortgagor in fee (or, in case the land in the

property or project is held by the mortgagor under a leasehold or other interest less than a fee, such amount as the mortgagor paid for the acquisition of such leasehold or other interest but, in no event, in excess of the fair market value of such leasehold or other interest exclusive of the proposed improvements), but excluding the amount of any kickbacks, rebates, or trade discounts received in connection with the construction of the improvements, or (ii) in case the mortgage is to assist the financing of repair or rehabilitation the term means the actual cost to the mortgagor of such repair or rehabilitation, including the amounts paid for labor, materials, construction contracts, off-site public utilities, streets, organization and legal expenses, such allocations of general overhead items as are acceptable to the Secretary, and other items of expense approved by the Secretary, plus (1) a reasonable allowance for builder's profit if the mortgagor is also the builder as defined by the Secretary, (2) an additional amount equal to (A) in case the land and improvements are to be acquired by the mortgagor and the purchase price thereof is to be financed with part of the proceeds of the mortgage, the purchase price of such land and improvements prior to such repair or rehabilitation, or (B) in case the land and improvements are owned by the mortgagor subject to an outstanding indebtedness to be refinanced with part of the proceeds of the mortgage, the amount of such outstanding indebtedness secured by such land and improvements, but excluding (for the purposes of this clause (ii)) the amount of any kickbacks, rebates, or trade discounts received in connection with the construction of the improvements: *Provided,* That such additional amount under (A) of this clause (ii) shall in no event exceed the Secretary's estimate of the fair market value of such land and improvements prior to such repair or rehabilitation, and such additional amount under (B) of this clause (ii) shall in no event exceed the approved percentage of the Secretary's estimate of the fair market value of such land and

improvements prior to such repair or rehabilitation. In the case of a mortgage insured under section 1715k of this title, section 1715l (d) (3), 1715l (d) (4), 1715v, 1715x, or 1715z—1 of this title, where the mortgagor is also the builder as defined by the Secretary, there shall be included in the actual cost, in lieu of the allowance for builder's profit under clause (i) or (ii) of the preceding sentence, an allowance for builder's and sponsor's profit and risk of 10 per centum (unless the Secretary, after finding that such allowance is unreasonable, shall by regulation prescribe a lesser percentage) of all other items entering into the term "actual cost" except land or amounts paid for a leasehold and amounts included under either (A) or (B) of clause (ii) of the preceding sentence. In the case of a mortgage insured under section 1715k of this title, section 1715l (d) (3), 1715l (d) (4), 1715v, 1715x, or 1715z—1 of this title, where the mortgagor is not also the builder as defined by the Secretary, there shall be included in the actual cost an allowance for sponsor's profit and risk of the said 10 per centum or lesser percentage of all other items entering into the term "actual cost" except land or amounts paid for a leasehold, amounts included under either (A) or (B) of the said clause (ii), and amounts paid by the mortgagor under a general construction contract.